

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
<u>ex rel.</u> PAUL CAIRNS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:12 CV 00004 AGF
)	
D.S. MEDICAL, L.L.C., et al.,)	
)	
Defendants.)	

JOINT STIPULATION OF UNCONTESTED FACTS

Pursuant to Paragraph II.1 of the Scheduling Order dated January 20, 2016 (#119), which was modified on April 13, 2017 (#250), Plaintiff, Defendants, and Relators (collectively, the “Parties”), through their undersigned counsel, hereby submit this Joint Stipulation of Uncontested Facts and Case Summary.

Case Summary: This is a civil case brought by the plaintiff, the United States of America, and the Relators, Paul Cairns, Dr. Terry Cleaver, Dr. Kyle Colle, Dr. Paul Tolentino, Dr. Kevin Vaught and Daniel Henson against the defendants Dr. Sonjay Fonn, Deborah Seeger, Midwest Neurosurgeons and DS Medical. Between March, 2008 and March, 2012, Dr. Fonn was a neurosurgeon practicing in Cape Girardeau. During back surgeries known as spinal fusions, Dr. Fonn would use spinal implants distributed by a company owned by Ms. Seeger, DS Medical. DS Medical received commission payments from spinal implant manufacturers for the spinal implants distributed by DS Medical. The legality of these relationships is at issue in this case. The plaintiffs alleges that the relationships involve violations of the Anti-Kickback Statute, and if claims were then filed with Medicare or Medicaid by Dr. Fonn’s company, Midwest Neurosurgeons or the

hospital where the surgeries took place, Saint Francis Medical Center, then those claims violated the False Claims Act. The defendants deny these allegations.

Statement of Uncontested Facts:

1. Dr. Sonjay Fonn is a neurosurgeon, licensed to practice medicine in Missouri and Illinois.
2. After finishing his neurosurgery residency, Dr. Fonn moved from Ohio to Cape Girardeau, Missouri and began practicing medicine in February 2008.
3. Dr. Fonn moved to Cape Girardeau with Deborah Seeger, with whom he had a long-term relationship.
4. Ms. Seeger received a B.S. in Nursing in 1992, and a Master of Science in Nursing in 2005. Since 2005, she has been a licensed Nurse Practitioner.
5. Dr. Fonn first met Ms. Seeger during his neurosurgical residency, at which time she was a neurosurgical intensive care unit nurse.
6. Dr. Fonn and Ms. Seeger are engaged to be married. They have been engaged since the summer of 2008. They have not married.
7. Dr. Fonn and Ms. Seeger had been dating and living together before they moved to Cape Girardeau in 2008.
8. In April 2009, Ms. Seeger purchased residential property located at 1533 Helmsdale Drive in Cape Girardeau, Missouri, for \$284,331.42. The purchase price was paid from a DS Medical bank account.
9. Ms. Seeger's and Dr. Fonn's attorney at Thompson Coburn calculated an initial rental for Dr. Fonn to pay Ms. Seeger for living with her at 1533 Helmsdale Drive at a price of \$2,500 a

month, inclusive of utilities. The attorney created a written rental agreement. Dr. Fonn paid rent from October 2009 thru March 2012 and beyond.

10. In June, 2010, at Dr. Fonn's request and after consultation with attorneys at Thompson Coburn, the utilities started being paid through a joint account of Dr. Fonn's and Ms. Seeger.

11. St. Francis Medical Center (St. Francis) is a hospital located in Cape Girardeau, MO. Dr. Fonn had privileges to perform surgeries at St. Francis Medical Center starting in March, 2008. As the months progressed, he obtained more expansive privileges to perform more and varied surgeries. Between January 2009 and March 2012, Dr. Fonn had neurosurgical privileges to perform surgery at St. Francis, and he performed spinal surgeries at St. Francis during that time period.

12. During some of the surgeries Dr. Fonn performed at St. Francis, he implanted spinal implant devices—such as screws, spacers, cages, and rods—in the patients.

13. There are many different manufacturers of spinal implants.

14. Smaller manufacturers sometimes use independent spinal implant distributors or sales representatives to distribute or sell their products to hospitals.

15. Dr. Fonn used spinal implants manufactured by different spinal implant manufacturers and spinal implants supplied by different spinal implant companies for various surgeries over the years.

16. In February 2008, Dr. Fonn joined the neurosurgical practice group of Cape Neurosurgeons (CNS) located in Cape Girardeau, Missouri.

17. CNS was owned by Dr. Kee Park, a Cape Girardeau neurosurgeon.

18. The primary spinal implant distributor for procedures done by doctors at CNS when it was owned by Dr. Park was J.P. Medical which was owned by Dr. Park's brother, John Park.

19. When Dr. Fonn joined CNS, he was expected to use J.P. Medical.

20. While working at CNS, Dr. Fonn mostly utilized spinal implants from J.P. Medical.

21. After Dr. Park stopped his practice, Dr. Fonn saw the opportunity to try new products.

22. In the second half of 2008, Dr. Park took an extended sabbatical from his practice in Cape Girardeau.

23. In the second half of 2008, following Dr. Park's extended sabbatical, Dr. Fonn was able to expand his practice, as many of Dr. Park's former patients transferred their care to Dr. Fonn.

24. Dr. Fonn is the owner and sole proprietor of Midwest Neurosurgeons, LLC (MWN). MWN was incorporated at the end of 2008 and began accepting patients in early 2009. MWN is a neurosurgical practice providing neurosurgical care to patients.

25. In order to participate in the Medicare program, in 2009, Dr. Fonn's company, MWN, completed CMS Form 855I. As part of that application, Dr. Fonn signed the following certification: "I agree to abide by the Medicare laws, regulations and program instructions that apply to me or to the organization listed in Section 4A of this application. . . . I understand that payment of a claim by Medicare is conditioned upon the claim and underlying transaction complying with such laws, regulations and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the supplier's compliance with all applicable conditions of participate in Medicare."

26. Dr. Fonn had "medical decision making power" to decide what spinal implants would be used in surgeries he performed at St. Francis.

27. DS Medical was issued a Certificate of Organization by the Secretary of State of Missouri on November 12, 2008, which recognized it as a limited liability company under Missouri law.

28. Ms. Seeger is, and at all times has been, the sole owner and manager of DS Medical.

29. DS Medical distributes surgical equipment, including devices implanted during spinal surgery.

30. DS Medical leased office space from Midwest Neurosurgeons, as reflected in Lease Agreements signed between the two companies.

31. Samie Wesley was an independent contractor engaged as a “Surgical Representative” by DS Medical between January 2009 and September 2009.

32. Samie Wesley was employed by Midwest Neurosurgeons beginning on January 19, 2009 as a Receptionist/Medical Assistant.

33. Bridgette Scroggins was an independent contractor engaged as a “Service Representative” by DS Medical between July 2011 and the summer of 2012.

34. Bridgette Scroggins was employed by Midwest Neurosurgeons from February 17, 2010 through February 27, 2013 as a Medical Assistant.

35. Janet Hostalek was an independent contractor engaged as a “Service Representative” by DS Medical between July 2011 and the summer of 2012.

36. Janet Hostalek is employed by Midwest Neurosurgeons as a Medical Assistant since July 12, 2010.

37. At Deborah Seeger’s direction, DS Medical service representatives ensured that the devices and surgical tools were sterilized before surgery, and also accounted for the devices used during surgery by making a record of which devices were use during the surgery.

38. The record was known as a “sales order” or “surgery sheet.”

39. DS Medical representatives completed “sales orders” or “surgery sheets” while present in the operating room at or near the time of the surgery.

40. Those “sales orders” or “surgery sheets” were provided to St. Francis and to the manufacturer of the spinal implants.

41. The spinal implant manufacturer paid DS Medical a commission.

42. DS Medical received commission payments from Amedica.

43. DS Medical commission payments from Amedica were in exchange for serving as a distributor for Amedica’s products.

44. Commission payments from Amedica were calculated based on the amount of Amedica’s sales of medical device products to St. Francis for which DS Medical was the distributor.

45. DS Medical received a commission for the medical device products sold by Amedica to St. Francis that were used in surgeries performed by Dr. Fonn when they were ordered through DS Medical.

46. DS Medical received sales commission payments from Verticor.

47. DS Medical received sales commission payments from Verticor in exchange for serving as a distributor for Verticor’s products.

48. Commission payments from Verticor were calculated based on the amount of Verticor’s sales of medical device products to St. Francis for which DS Medical was the distributor.

49. DS Medical received a commission for the medical device products sold by Verticor to St. Francis that were used in surgeries performed by Dr. Fonn when they were ordered through DS Medical.

50. Dr. Fonn used Globus Medical spinal implant products during some, but not all, of his surgeries at St. Francis in October and November 2008.

51. November 21, 2008 was the last day Dr. Fonn used Globus Medical spinal implant products in his surgeries.

52. On December 3, 2008, Ms. Seeger signed a Sales Agent Agreement with Amedica on behalf of DS Medical.

53. The Agreement provided that Amedica would pay DS Medical a 30-35 percent commission for DS Medical's sales of Amedica products.

54. Dr. Fonn used some Amedica products for a time period before DS Medical became an Amedica distributor.

55. The Chief Executive Officer of Amedica during 2008 and 2009 was Dr. Ashok Khandkar.

56. Mr. Jon Wait was a regional sales manager for Amedica.

57. In 2008, Mr. Chad Underhill was a regional sales manager for Life Spine.

58. On December 4, 2008, Ms. Seeger signed a Sales Representative Agreement with Life Spine on behalf of DS Medical.

59. Ms. Seeger signed a Representative Agreement with Verticor on or about December 18, 2008.

60. The Verticor Representative Agreement provided that Verticor would pay DS Medical a commission of 50 percent on all DS Medical sales of Verticor products, except Biologics. The agreed commission rate for DS Medical's sale of Verticor Biologics was 25 percent. Verticor sold a number of items, including the Talon screw manufactured by Spine 360.

61. Todd Stanaford was the President of Verticor in 2008 and 2009.

62. Dr. Fonn used some Verticor products for a time period before DS Medical became a Verticor distributor

63. Jon Wait was the distributor for Verticor products used by Dr. Fonn for the time before DS Medical became the distributor for Verticor.

64. Dr. Fonn was the only physician who received spinal implants from Verticor through DS Medical.

65. In 2009 a dispute arose between Verticor and DS Medical.

66. On November 17, 2009, DS Medical and Amedica entered into an amendment to their first contract. The amendment provided for DS Medical's commission to 50 percent of DS Medical's sales of Amedica products.

67. On July 21, 2010, Dr. Fonn purchased \$500,000 in Amedica stock through the company.

68. Ms. Seeger made renovations and purchases related to the Helmsdale property before and after Ms. Seeger and Dr. Fonn moved into the home.

69. In April 2010, Ms. Seeger, with the help of attorneys at the Thompson Coburn law firm, established a limited liability company under Missouri law known as DS Enterprises, LLC (DS Enterprises).

70. From its creation through at least July 2012, Ms. Seeger was the sole member of DS Enterprises.

71. DS Medical maintained a bank account at Bank of America, number XXXX-XXXX-8180 (-8180 account).

72. DS Enterprises maintained a bank account at Bank of America, number XXXX-XXXX-7173 (-7173 account).

73. On December 28, 2010, Dr. Fonn made a loan for \$500,000 to DS Enterprises.

SO STIPULATED.

Dated: September 25, 2017

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